VIRGINIA LAW REGISTER

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We are much indebted to the learned Justice of the Supreme Court of Nova Scotia for his very entertaining and instructive Note on the Relations between Virginia and Nova Scotia in the Colonial Days. It is a splendid addition to the article, "Why the Laws of Virginia?", by Dr. J. Murray Clark, K. C., of Toronto, published in the June number of the REGISTER.

Mr. Justice Chisholm's Article.

It is with no little feeling of pride that we Virginians of to-day see from these articles what a preeminence the Old Dominion had in those days—giving shape and model for the laws and judicial system of a colony so far removed as Nova Scotia. The profession of this Commonwealth owes to Dr. Clark and Mr. Justice Chisholm a debt of gratitude hard to be over estimated.

It is said that Daniel Webster once, in the United States Senate, addressed Senator Wm. Rives as "The Senator from Albemarle" — the county of Mr. Rives' residence. On being corrected by Mr. Rives, who reminded the Senator from Massachusetts that he was a Senator from Virginia, the immortal Daniel, with a wave of his hand replied, "It's the same thing, sir. He who represents Albemarle represents Virginia."

The Albemarle Bar, I.

Se non è vero è ben trovato, and people who are fortunate enough to claim Albemarle as their birthplace thoroughly agree with "Dan'l".

It is therefore to be expected that the bar of this great County should have been men of mark, and the writer proposes in an article or so, to write of the men who practiced at the Albemarle Bar.

Whilst not confining himself exclusively to lawyers who resided in Albemarle yet as far as possible he will attempt to speak of very few outside of the County. The loss of the court records from 1752 to 1781—which were burned by Tarleton in his raid in 1782—makes the writer's task a little difficult as to the early history of this Bar.

One great lawyer and statesman born and reared in the historic County is at once suggested. Thomas Jefferson's fame as a statesman, as a philanthropist, as a public character, has well nigh eclipsed the fact he was an active practitioner of the law and did a large business at the bar of his native county. He came to the bar in 1767, when he was twenty-four years of age, and in that year was employed in sixty-eight cases, the next year in one hundred and fifteen, and from thence up to 1774 he was an exceedingly busy lawyer. The cases above referred to were in the general court, but in 1771 he was employed in no less than four hundred and thirty cases, of which one hundred and thirty-seven were in the general court.

He kept a most careful docket, which is now, we understand, in the New York Public Library. The book was in the possession of Mr. Jefferson's grandson, the venerable Thomas Jefferson Randolph. It was the writer's privilege to inspect it once at Edge Hill. In this book carefully ruled for the purpose, Mr. Jefferson set down the name of the case, the plaintiff and defendant, then a brief statement of its nature, then the names of witnesses, then authorities, and finally the result and the amount of his fee. This book was stolen and subsequently Col. Randolph saw that it was being exhibited by a prominent statesman. He wrote, stating that the book was his property, had been stolen, and requested its return. He received a reply in which the statesman stated that he had bought the book, paid for it and proposed to keep it, and did so. From it one ascertained that Mr. Jefferson's fees averaged about three thousand dollars a year, which considering the time and value of money was a very successful practice. That he occupied a high position as a lawyer is shown by the names of the clients which appear on his books. The Blands, Burwells, Byrds, Carters, Careys, Harrisons, Lees, Nelsons, Pages and Randolphs were his clients.

The list embraces several Royal Counsellors of State and other crown officers. He was associated with Wythe and Pendleton and Peyton Randolph, and in one case associated with the Attorney General by Col. Corbin, Receiver General, in a suit brought by Ex-Governor Dinwiddie, then in England, against a citizen of Virginia.

That he was a great lawyer hardly admits of a doubt. The preeminence assigned him by Wythe and Pendleton in the revision of the laws of Virginia indicates this, as well as his Reports of the Decisions of the General Court. And when one studies his written opinions and papers as Secretary of State, his Parliamentary Manual, his paper prepared for the use of counsel in the Baiture case, one can see that a great legal career was sacrificed in the service of his country.

As an advocate he never could have risen to the highest rank. His voice did not permit him to speak at any length. If raised much above ordinary conversation, it became husky and inarticulate. This explains his unwillingness to make any extended remarks before legislative or popular bodies. We have Mr. Madison's testimony, however, that his speeches before the courts, delivered in a conversational voice, were fluent and well conceived, and attracted the earnest consideration of judges and juries alike. He was par excellence an office lawyer—careful, precise, sound, of splendid judgment, and was probably the most frequently consulted lawyer of his age in the Commonwealth. It must be remembered that he did not confine his practice to Albemarle, but was engaged in Richmond and other sections of the State as well.

Though not a resident of Albemarle, Patrick Henry was a regular practitioner at its Bar. He had a sister living in Albemarle—Mrs. Valentine Wood—and frequently visited her.

It has been the habit to sneer at Mr. Henry's standing as a lawyer, but nothing could have been more unjust than to do this. The man to whom Robert C. Nicholas—at the suggestion of Mr. Jefferson—turned over his unfinished business, could not have been either the lazy or indifferent lawyer his enemies tried to make him appear. The writer had occasion some years since to examine a divorce suit brought by Mr. Henry as counsel in

Louisa. The papers were carefully and neatly drawn, and the case evinced neither lack of knowledge or of preparation.

Of the men who practiced at the Albemarle Bar with Jefferson and Henry few memories remain. Probably the most distinguished of them was the son of his guardian John Harvie. John Harvie, Jr., was quite a prominent man in his day and generation. He was a member of the House of Burgesses and of the Continental Congress, and it is said that it was owing to the fact that he was a member of the Continental Congress that he procured the establishment of the prison camp for the Convention prisoners surrendered by Burgoyne, at the Barracks in Albemarle County. He was probably the most prominent lawyer, next to Mr. Jefferson, a resident of Albemarle County during his lifetime. He was a large landowner in the County, owning the tract of land upon which now is situated the Belmont addition to Charlottesville. He also owned the Pen Park property subsequently owned by Dr. George Gilmer. On being appointed by Mr. Jefferson Register of the Land Office he removed to Richmond and died in that city in 1807. He built a good many dwellings in Richmond, one of which was known as the Gamble Mansion, and in the erection of which his death was caused by his falling from a ladder.

His only daughter, Gabrielle, was a great beauty and wit and created quite a sensation by marrying the elder Thomas Mann Randolph, who at the time of his marriage was old enough to have been her grandfather. The marriage was not a happy one, as might have been expected.

I have no record of any cases in which Harvie was interested while he practiced at the Albemarle Bar.

Right of Trial by Jury. Does It Exist in the Federal Courts?

It is a well known fact that Mr. Jefferson once spoke of the Federal Courts as the "sappers and miners of the Constitution". We have always thought that Mr. Jefferson in his great dislike for anything like federalism carried it a little too far, but now and then there comes a decision even from the highest tribunal in the land, which gives us a shock. Arti-

cle 6 of the Constitution of the United States provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." Does trial by jury exist when a judge gives the following charge? "In conclusion I will say that a failure to bring in a verdict in this case can only come from a willful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. Of course I cannot tell you in so many words to find the defendant guilty but what I say means that."

Now, can a prisoner be said to have trial by an impartial jury when the jury has thus been instructed almost peremptorily to find the prisoner guilty? The opinion of the court is delivered by Mr. Justice Holmes, and even he says that there was a regrettable peremptoriness of tone, but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts, and that in our judgment was all that was left to them after the defendant and his witnesses took the stand. The Chief Justice, Mr. Justice McReynolds, and Mr. Justice Day, together with Mr. Justice Brandeis, dissented, and with the knowledge of the power and force of these four dissenting justices we are constrained to hope that this case may not always remain the law. Mr. Justice Brandeis delivered the dissenting opinion, which being brief, we here insert. In our humble judgment the contention of the Justice in this dissenting opinion is absolutely unanswerable, and he well said that the judge in this case usurped the province of the jury, and the right to trial by an impartial jury became a farce.

Mr. Justice Brandeis, dissenting, said:

> "It has long been the established practice of the Federal courts that, even in criminal cases, the presiding judge may comment freely on the evidence and express his opinion whether facts alleged have been proved. Since *Sparf* v. *United States,* 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the Federal courts that the jury in

criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute. *United States* v. *Taylor,* 3 McCrary, 500, 11 Fed. 470; *Atchison, T. & S. F. R. Co.* v. *United States,* 27 L. R. A. (N. S.), 756, 96 C. C. A. 646, 172 Fed. 194. What the judge is forbidden to do directly, he may not do by indirection. *Peterson* v. *United States,* 130 C. C. A. 398, 213 Fed. 920. The judge may enlighten the understanding of the jury, and thereby influence their judgment; but he may not use undue influence. He may advise; he may persuade; but he may not command or coerce. He does coerce when, without convincing the judgment, he overcomes the will by the weight of his authority. Compare *Hall* v. *Hall,* L. R. 1 Prob. & Div. 481, 482, 37 L. J. Prob. N. S. 40, 18 L. T. N. S. 152, 16 Week. Rep. 544.

"The character of the charge in this case is illustrated by the following paragraph: 'In conclusion I will say that a failure to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. Of course, gentlemen, I cannot tell you in so many words to find defendant guilty, but what I say amounts to that.'

"In my opinion, such a charge is a moral command; and, being yielded to, substitutes the will of the judge for the conviction of the jury. The law, which, in a criminal case, forbids a verdict directed 'in so many words,' forbids such a statement as the above.

"It is said that if the defendant suffered any wrong, it was purely formal; and that the error is of such a character as not to afford, since the Act of February 26, 1919, chap. 48, 40 Stat. at L. 1181, Comp. Stat. § 1246, a basis for reversing the judgment of the lower court. Whether a defendant is found guilty by a jury, or is declared to be so by a judge, is not, under the Federal Constitution, a mere formality. *Blair* v. *United States,* 154 C. C. A. 137, 241 Fed. 217, 230. The offense here in question is punishable by imprisonment. Congress would have been powerless to provide for imposing the punishment except upon the verdict of the jury. *Callan* v. *Wilson,* 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Thompson* v. *Utah,* 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. I find nothing in the act to indicate that it sought to do so. Because the presiding judge usurped the province of the jury, I am unable to concur in the judgment of the court."

We do know of one case in this Commonwealth in which a Federal judge gave a peremptory order to a jury to convict and the jury declined to do so. It has been a great many years ago and the judge who gave the instruction is dead. Some ingenious fellow took pieces of sheet lead and fashioned them into the exact size and weight of a nickle and with them proceeded to beat the slot machines throughout the country. He was indicted for counterfeiting and on his trial the presiding judge peremptorily instructed the jury that his act constituted counterfeiting and that he was guilty and they should so find. The jury, however, did not agree with the learned judge and brought in a verdict of "not guilty," for which they received, as one of them said, a lot of very genteel abuse from his Honor. We think the jury did exactly right and it shows the danger of a judge usurping the province of the jury and practically telling them to find a man guilty.

Women as Jurors.

We take pleasure in publishing herewith the instructions of the Honorable R. L. Gardner, Judge of the Corporation Court for the City of Radford, to the Jury commissioners, in regard to the service of women upon juries, but as our editorials have already overrun the space allotted to them we will reserve comment for some future number. We made some discussion of this subject in Volume 6, New Series, page 454 of the REGISTER.

"Gentlemen: Under the Virginia statute, Jury Commissioners must be appointed annually. They cannot succeed themselves; Hence, I have selected you gentlemen to serve as such commissioners for the ensuing year. Observe that I have not placed a female upon the commission.

"Heretofore, the duties of jury commissioners, whilst exacting and attended with more or less tedium, have not been difficult.—Now, however, as you are well aware, a class of citizens has been enfranchised that practically doubles the voting list from which you must place in the jury box 'not less than one hundred nor more than three hundred * * * as are well qualified to serve as jurors' to serve the court for the current year.

"As at present administered, the Virginia constitution declares that 'No man shall be deprived of life, or liberty, except by the judgment of his peers;' or, (may I add), the judgment of his dears.

"Verily, a woman may not demand trial by a jury of females any more than an Englishman may demand an English jury; a German a German jury; an Irishman an Irish jury; a Negro a negro jury, or a Chinaman a Chinese jury—nor a mixed jury, nor a presiding judge of the feminine gender. The most that the citizen may demand is an impartial jury of his peers and a just judicial tribunal, 'learned in the law.'

"Mr. Blackstone, in his Commentaries avers that: 'The right of trial by jury, or country, is trial by the peers of every Englishman and is the grand bulwark of his liberties, and is secured by the Great Charter.'

"And in *Strauder* v. *West Virginia,* and the Virginia case wherein the indictment and arrest of Judge Cole, of Pittsylvania county, by a federal district court for his failure to furnish mixed juries was involved—(100 U. S. 25; Law Ed. pp. 648-87) it is said 'The very idea of a jury is a body of men composed of peers, or equals, of the person whose rights it has been selected to determine'—that is, of persons having their same legal status in society.

"THE VIRGINIA LAW REGISTER, (Vol. 6 N. S., p. 455), asks editorially: 'But suppose the jury commissioners select a number of women as jurors, put their names in the box and they are drawn for service and are willing to serve. Can the judge arbitrarily decide that they are not qualified jurors?'

"Of course a court scorns to act arbitrarily, in all conscience.

"Mr. Justice Strong in delivering the majority opinion in the West Virginia case above, points out that the statute of that State itself restricts jury service to 'white male citizens,' which alone amounts to a denial of the equal protection of the law to the colored man;—nevertheless says this: 'We do not say that within the limits from which it is not excluded by the amendment, (14"), a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th amendment was ever intended to prohibit that.'

"This Anthony amendment, technically the nineteenth, provides: 'The right of citizens of the United States to vote

shall not be denied, or abridged, by the United States nor by any state on account of sex. Congress shall have power to enforce this article by appropriate legislation.'

"That such constitutional provision gives to women the absolute right to vote and all that right necessarily implies, must be conceded. That 'she' is a citizen, and as such entitled to all the 'rights, privileges and immunities' of the fourteenth amendment, which was the supreme effort of a domineering congress to avert discrimination because of race, or color, and not because of sex, and familiarly known as the 'equal rights' amendment, is also, true. The question to be here determined, however, is:—Does it give to them, the women, a right to serve as jurors?

"In this regard, our Virginia statute prescribes that: 'All male citizens, over twenty-one years of age * * * shall remain and be liable to serve as jurors.'

"It is clear that the right to vote is a constitutional right: a right guaranteed the citizen which neither congress nor a legislature can deny nor abridge. That is the plain, full purport of this nineteenth amendment.

"But jury service is distinctly different.

"The one is a constitutional right; an inalienable right; one of the most sacred rights and accordingly, the greatest gift within the power of state or nation. The other jury service, is a liability of the citizen: a duty imposed by the law-making power; as one Senator Warren Gamaliel Harding would express it, 'an enforcement.

"Evidently, the word 'remain' found in the Virginia statute has direct relation to jury service under the common law, where man alone served his realm as peer. And this Common law is in force in Virginia, except in so far as changed by statute.

"Delving briefly into history, the earliest courts seem to have been the corporation courts of Charles City and Elizabeth City—Henings's Statutes, vol. 1, p. 125. Government in Virginia antedates the government of these United States by nigh on to two centuries: for, when certain of Virginia's distinguished representatives repaired to the first Congress, at Philadelphia, they bore authority from The House of Burgesses, the oldest legislative body of continuous existence amongst the Anglo Saxon race. Virginia, the State, was powerful, great under that government and the men such government inspired. Then was there local self-government in the State: the influence of the individual from whom emanates all representative government.

"'Liability to serve,' as indicated, means obligatory service:

the duty the citizen owes the state. The highest character of civic duty the state may exact. The duty to render service whenever and as required: that duty of which the great Lee said, or is accredited with saying; duty is the sublimest word in the English language.

"All the authorities, federal and state, whilst perplexing and confusing because of other predominating questions involved in the decisions, make it clear that: The right to vote is a constitutional right conferred; the liability to serve as juror is a legislative duty imposed.

"My deliberate opinion is that women cannot lawfully serve as jurors—unless and until the Virginia legislature so modifies its statute as to make the same read, substantially:

"'All male and female citizens, twenty-one years old * * * shall be liable to serve as jurors.—" thus imposing upon females, equally with males, the duty of jury service. And my plain duty is to so instruct you gentlemen.

"It is not within the province of a court to indulge the luxury of personal feeling, or consideration, in such matter.

"The judgment of this court, therefore, is that you gentlemen do not place the name of any female in the jury box.

"Ro. L. Gardner."

What Is a Child?

Section 4409 of the Code of 1919 has never been before the Supreme Court of Appeals. The lower courts therefore are compelled to pass upon it with very little aid from any authority. Indeed, there is hardly any authority, even of the persuasive kind we have been able to find.

The section is as follows:

"If any person other than the father or mother of a child, illegally seize, take or secrete a child from the person having lawful charge of such child, he shall be confined in the penitentiary not less than two nor more than five years, or at the discretion of the jury, in jail not exceeding one year, and be fined not exceeding one thousand dollars."

The important part of the section relates to the word "child." What is a "child?" The question came up in a circuit court very recently in which a woman was charged with taking and secreting a child. The child in question was a girl between the ages of fifteen and sixteen and it was urged by counsel for the

defence that having arrived at the age of puberty, the girl was no longer a child and that therefore no offence against the statute had been committed. 7 Cyc. page 124, was quoted, which defines a child to be, persons under lawful age as distinguished from adults, infants, minors, persons of tender years, young persons, youths, the young of the human species, generally under the age of puberty without distinction of sex, young persons of either sex, and hence persons who exhibit the character of a very young person.

Pittsburg v. *Vining,* 27 Ind. 513, was quoted to sustain the point that the word "child" is applied to infants from their birth and that the time when they cease ordinarily to be so called is not defined by custom.

Allen v. *State,* 7 Texas Appeals 298, was also quoted, in which the court instructed the jury that the term "child" means one of tender years, not a minor or under twenty-one years of age, and that they must take the word in its common acceptation.

In *State* v. *Gaston,* 96 Iowa 505, it was said that the word is quite frequently applied to any young person at any age less than maturity; and in *Blackburn* v. *State,* 22 Ohio State, 102, it is said that in the most popular and most common use of the word the female ceases to be a child and becomes a woman at the age of puberty, and this seems to be in accordance with the primary or leading definition of the terms of lexicographers.

Bell v. *State,* 18 Texas Appeals 56, was quoted, that a child means a young person as contradistinguished from one of age sufficient to be supposed to have settled habits and fixed discretion. Black's Law Dictionary, however, on the other hand, defines the word "child", in the law of negligence and in laws for the protection of children, to be used as the opposite of adult.

On the other hand the prosecution insisted that in the purview of this statute a child was any one under twenty-one years of age, and the learned judge took this view and instructed accordingly. We are inclined to the opinion that the judge was right. The object of this statute was undoubtedly to protect the rights of parents in the care and custody of their children. Until a child is twenty-one years of age the parent is entitled to its services, its earnings, its companionship, and any one taking

such child away and secreting it, is guilty of a crime which it was evidently the intention of the statute to punish. To limit the age of the child to puberty would be to allow a child to be taken from a parent and secreted at the time its services and companionship are of the most value to the parent. It is a curious fact and not unworthy of attention that in Pollard's Code this section is placed in the chapter relating to offences against *property*. The Revisors in the Code of 1919 have placed it in the chapter relating to offenses against the person. The fact is that the statute might very well have been allowed to remain in the former chapter, for it might well be said that it was to protect the property rights of the parent in the child that the statute was enacted. The offense is really against the parent—though of course the child's welfare is also sought to be protected.

The statute in regard to kidnapping, Sec. 4407, uses the word "person" and the gravamen of the offense is kidnapping "with intent to extort money or pecuniary benefit." The offense of kidnapping "a person" with intent to sell or use him as a slave, also limits the offense to "selling or using". So if Section 4409 was intended to limit the age of the child to puberty, then it would be no offense to seize, take or secrete anyone between the ages of puberty and twenty-one. We hardly think the Legislature would have passed such an act, did it not have the rights of the parent over the child up to full age in view.

Mr. Norvelle L. Henley, in an article in XIII VIRGINIA LAW REGISTER 169, takes this same view.

The New Revised Statutes of the United States.

The necessity for a revision of the Federal Statutes has been for some time too evident to require argument. While it is true that Barnes' Federal Code has been a most valuable and much used book, an official publication is absolutely necessary.

It is with some pardonable pride that the Virginia Bar recognizes that one of its most distinguished members, Honorable Walton Moore, Member of Congress from the Eighth District,

has been largely instrumental in bringing this *magnum opus* to a conclusion. It is indeed a *magnum opus*. It will contain some three million words, and Mr. Moore in speaking of it says:

> "The passage of this bill, which embodies the complete codification, will gather into one volume of 1,251 pages, exclusive of the index, and containing 10,747 sections, the entire statute law as it was in effect on the 4th day of March, 1919. This volume, as now actually printed and submitted for consideration and approval, will be furnished with a careful and exhaustive index made in the same manner in which the Statutes at Large are indexed."

Through the courtesy of Mr. Moore we have been furnished a copy of the "Bill", which is in fact the Volume of the Acts as they will appear when published in book form. It is a huge volume, but not much larger than a bound volume of the Congressional Record. It brings out of the confusion and uncertainty of the present compilation in many volumes a degree of certainty and ease of search which is most gratifying to judges and lawyers alike. We think it might well be entitled "The United States Code of 1921."

The House Committee after nearly a year and a half of solid labour with expert cooperators and assistants have brought the bill into its present shape and its passage ought to be expedited with all possible speed.

To Mr. Moore, who has labored earnestly over the matter, the thanks of the judges, lawyers and general public ought to, and will, we are confident, be most cordially extended.

Conditional Delivery of Contract under Seal.

A decision which overrules a precedent establishing a highly technical and outgrown rule of law is to be commended. Such a case is *Whitaker* v. *Lane*, 104 S. E. 252, 6 V. L. R. 681, wherein the Supreme Court of Appeals in a well considered opinion by Judge Burks held that parol evidence is admissible to show that a sealed contract for the purchase of land was delivered to the

vendor to become effective only on the happening of a specified condition.

This decision opposes the great array of authority in the State courts of this country as well as the decisions of our own Supreme Court of Appeals, which have followed the old common law rule as laid down by Coke on Littleton and as stated in the oft-quoted language of Sheppard's Touchstone, that "if I seal my deed and deliver it to the party himself upon condition, the deed is absolute and the condition is void, as the declaration of the condition is inconsistent with the act of delivery which gives effect to the instrument."

Judge Staples, in *Miller* v. *Fletcher,* 27 Grat. (68 Va.) 403, 21 Am. Rep. 356, after reviewing some of the cases considering the question says:

> "A doctrine sustained by such an array of authorities, a doctrine which has survived all the changes and innovations of modern reform, must have something to commend it to the approbation of the courts beyond its mere antiquity. It is not to be overturned by denunciation. The chief argument against it is that it recognizes distinctions technical and unsatisfactory in the extreme."

This very argument was sufficient to prove the very goodly and wise undoing of the doctrine in Virginia. The language of Judge Burks in referring to this contention of Judge Staples is well worth quoting:

> "This is undoubtedly true, and while great consideration should be given to precedent, especially to one of long duration and general acceptance, it cannot be that a rule merely established by precedent is infallible. This would stay all progress and forbid all development. If the rule established by precedent is highly technical, and finds its origin in reasons which no longer exist, and the courts have from time to time found it necessary to make exceptions thereto to meet the needs and methods of doing business in modern times, it would seem that the courts should adapt their procedure to the age in which we live, and cease to follow a precedent for which they have always to apologize, and declare that it is highly technical and not justified either by reason or policy."

As early as 1601 an effort was made to get away from the technical doctrine of the common law, and in *Hawksland* v. *Gatchel,* Cro. Eliz. 835, it was held that there is not any difference where a deed is delivered to the party himself as an escrow and where to a stranger. But as Wigmore observes "the authority and vogue of Coke's and Sheppard's writings obscured and suppressed prematurely this progressive conception." 4 Wigmore, Ev. § 2405.

In Virginia the common-law rule had already been trenched upon in many respects before the present decision. There have been decisions permitting incomplete sealed instruments to be delivered on condition. Other departures in this state from the strictness of the common-law, are pointed out by Judge Burks as follows:

> "We have held that a deed absolute on its face may be shown by parol to be a mortgage, which is nothing more than a condition for the payment of money (*Holladay* v. *Willis,* 101 Va. 274, 43 S. E. 619; *Motley* v. *Carstairs,* 114 Va. 429, 76 S. E. 948); that parol evidence will be received to show that a consideration expressed in a conveyance of land as paid by one was in fact paid by another, the effect of which is to create a resulting trust in favor of the party paying the money (*Bank of U. S.* v. *Carrington,* 7 Leigh [34 Va.] 566; *Jesser* v. *Armentrout,* 100 Va. 666, 42 S. E. 681); that a deed absolute on its face may be shown to be subject to an expressed parol trust (*Young* v. *Holland,* 117 Va. 616, 84 S. E. 637); and that in suits for the specific performance of contracts for the sale of land it may be shown that the plaintiff is not entitled to have performance."

After reading Judge Burks' review of the authorities in England, in the Supreme Court of the United States and in Virginia it is readily seen that "There is little left upon which to uphold the common-law rule, except the statements of Coke and of Sheppard, that a sealed instrument cannot be delivered by the obligor to the obligee on condition, and the cases based thereon, and 'no reason and no policy justifies' the further adherence to the rule. The whole situation is amply cared for by the parol evidence rule, which applies as well to sealed as to unsealed instruments." B. S.